Ooi Chew Seng v Ultratech Sdn Bhd & Ors

HIGH COURT (KOTA BHARU) — ORIGINATING SUMMONS NO 24–199–1996
NIK HASHIM JC
12 DECEMBER 1996

Civil Procedure *— Preliminary objection — Notice to opponent — Whether prior notice at the earliest possible moment had been given*

Civil Procedure *— Preliminary objection — Affidavit in support of preliminary objection — Whether affidavit evidence in support of preliminary objection necessary*

Civil Procedure *— Appeal — Notice of — Whether an unsigned, unsealed and undated notice of appeal was issued under O 56 r 1(3) of the Rules of the High Court 1980 — Whether such notice was valid — Rules of the High Court 1980 O 56 r 1(3)*

Civil Procedure *— Appeal — Notice of — Service — Whether service of unsigned, unsealed and undated notice was valid service — Rules of the High Court 1980 O 56 r 1(3)*

Civil Procedure *— Appeal — Notice of — Service — Failure to serve within prescribed period — Notice of appeal served 21 days after the date of the hearing but before the new date of the adjourned hearing — Whether service valid — Rules of the High Court 1980 O 56 r 1(3)*

Civil Procedure *— Appeal — Notice of — Service — Non-compliance with O 56 rr 1(2) & 1(3) of the Rules of the High Court 1980 — Whether appeal should be strike out — Rules of the High Court 1980 O 56 r 1(2) & (3)*

The appellant had filed a notice of appeal in court on 24 March 1996 which was issued by the court on the same date. A blank copy of the notice of appeal was served on the respondents on 11 April 1996. The sealed copy of the notice was only served on the respondents on 16 November 1996, 21 days after the first date of hearing of the appeal which was fixed on 29 October 1996. The hearing date was subsequently adjourned to 19 November 1996 at the request of the appellant. The respondents raised a preliminary objection that the respondents were not served with a sealed copy of the notice of appeal two clear days before the day fixed for the hearing of the appeal (ie 29 October 1996) in contravention of O 56 r 1(3) of the Rules of the High Court 1980 ('the RHC'). No affidavit evidence was tendered to support the preliminary objection. However, a day before the hearing of the appeal, the respondents' solicitor had sent a notice of the preliminary objection by fax to the appellant's counsel.

The issues before the court were whether: (i) prior notice at the earliest possible moment had been given of the preliminary objection; (ii) affidavit evidence in support of the preliminary objection was necessary; and (iii) the notice of appeal was validly issued and/or served on the respondent.

Held, allowing the preliminary objection and striking out the appeal:

(1) Prior notice appears to be the only requirement that is needed before a preliminary objection is raised. In this case, the procedural requirement of giving the other side notice at the earliest possible moment had been satisfied.

Since a notice was given and the disputed unsealed copy of the notice of appeal was made available before the court, an affidavit evidence in support was not necessary. A prior notice of the preliminary objection was sufficient. As prior notice was given to the appellant in this case, he could not be heard to say that he was caught by surprise by the preliminary objection of the respondents (see pp 348I and 349A–B); *Datuk Bandar Kuala Lumpur v Seman bin Amat and other cases* [1996] 3 CLJ 263, *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370 and *Jasabena Sdn Bhd v Beh Heng Poo & Anor* [1985] 1 MLJ 394 followed.

(2) The notice of appeal that was not signed, sealed and dated was not 'issued' within the meaning of O 56 r 1(3) of the RHC and hence was an invalid notice, the service of which on the respondents could not be considered a valid service (see pp 349I and 350B–C); *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 followed.

(3) The provisions of O 56 r 1(3) of the RHC are mandatory, and it is the duty of the party who wishes to appeal to comply with them strictly. According to O 56 r 1(3), the service of the notice has to be effected two clear days before the returnable day for hearing of the appeal. In this case, the proper notice was not served until 16 November 1996, ie 21 days after 29 October 1996, the date fixed for hearing the appeal. The adjournment of the hearing of the appeal to 19 November 1996 did not have the effect of extending the date of service of the valid notice of the appeal. Therefore, the valid one was served outside the prescribed period. This being the case, the appeal could not be said to have been brought properly before the court, and as such it should be struck off with costs (see p 350D–E, G–H); *Public Feedmill (M) Sdn Bhd (In liquidation) v Hai Yeu Hin* [1994] 2 MLJ 34 followed.

[Bahasa Malaysia summary

Perayu telah memfailkan suatu notis rayuan di mahkamah pada 24 Mac 1996 yang dikeluarkan oleh mahkamah pada tarikh yang sama. Sesalinan notis rayuan kosong disampaikan ke atas penentang-penentang pada 11 April 1996. Salinan notis yang dimeterai hanya disampaikan ke atas penentang-penentang pada 16 November 1996, 21 hari selepas tarikh pembicaraan rayuan yang pertama yang ditetapkan pada 29 Oktober 1996. Tarikh pembicaraan kemudiannya ditangguh kepada 19 November 1996 atas permintaan perayu. Penentang-penentang membangkitkan bantahan permulaan bahawa penentang-penentang tidak disampaikan dengan salinan meterai notis

rayuan dua hari genap sebelum hari yang ditetapkan untuk pembicaraan rayuan (iaitu 29 Oktober 1996) yang melanggar A 56 k 1(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Tiada keterangan afidavit dikemukakan untuk menyokong bantahan permulaan. Namun demikian, sehari sebelum pembicaraan rayuan, peguamcara penentang-penentang telah menghantar notis bantahan permulaan dengan faks kepada peguam perayu.

Isu-isu di hadapan mahkamah adalah sama ada: (i) notis terdahulu di saat yang paling awal telah diberikan tentang bantahan permulaan; (ii) keterangan afidavit yang menyokong bantahan permulaan adalah perlu; dan (iii) notis rayuan telah dikeluarkan secara sah dan/atau disampaikan ke atas penentang-penentang.

Diputuskan, membenarkan bantahan permulaan dan membatalkan rayuan:

(1) Notis terdahulu nampaknya adalah satu-satunya keperluan yang dikehendaki sebelum suatu bantahan permulaan dibangkitkan. Dalam kes ini, keperluan prosedur untuk memberikan pihak yang satu lagi notis di saat yang paling awal telah dipenuhi.

Oleh kerana notis telah diberikan dan salinan notis rayuan tidak dimeterai yang dipertikaikan dikemukakan di mahkamah, keterangan afidavit yang menyokong tidak diperlukan. Notis terdahulu tentang bantahan permulaan adalah mencukupi. Oleh kerana notis terdahulu telah diberikan kepada perayu dalam kes ini, dia tidak boleh mengatakan dia terkejut oleh bantahan permulaan penentang-penentang (lihat ms 348I dan 349A–B); *Datuk Bandar Kuala Lumpur v Seman bin Amat and other cases* [1996] 3 CLJ 263, *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370 dan *Jasabena Sdn Bhd v Beh Heng Poo & Anor* [1985] 1 MLJ 394 diikut.

(2) Notis rayuan yang tidak ditandatangani, dimeteraikan dan bertarikh tidak 'dikeluarkan' dalam maksud A 56 k 1(3) KMT dan justeru itu adalah notis yang tidak sah, yang mana penyampaiannya ke atas penentang-penentang tidak boleh dianggap sebagai penyampaian yang sah (lihat ms 349I dan 350B–C); *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 diikut.

(3) Peruntukan A 56 k 1(3) KMT adalah mandatori, dan ia merupakan tanggungjawab pihak yang ingin merayu untuk mematuhi sepenuhnya. Menurut A 56 k 1(3), penyampaian notis mestilah dilaksanakan dua hari genap sebelum hari kembalian untuk pembicaraan rayuan. Dalam kes ini, notis yang wajar tidak disampaikan sehingga 16 November 1996, iaitu 21 hari selepas 29 Oktober 1996, tarikh yang ditetapkan untuk pembicaraan rayuan. Penangguhan pembicaraan rayuan kepada 19 November 1996 tidak mempunyai kesan melanjutkan tarikh penyampaian notis rayuan yang sah. Maka, yang sah telah disampaikan di luar

tempoh yang disyaratkan. Dalam keadaan demikian, rayuan tidak boleh dikatakan telah dibuat dengan betul di hadapan mahkamah, dan oleh itu ia patut dibatalkan dengan kos (lihat ms 350D–E, G–H); *Public Feedmill (M) Sdn Bhd (In liquidation) v Hai Yeu Hin* [1994] 2 MLJ 34 diikut.]

Notes

For cases on preliminary objection, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2773–2774.

For cases on notice of appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 567–602 and 699.

Cases referred to

Chern Yen Ming & Anor v Teng Ik Ngee Construction Sdn Bhd & Ors [1996] 4 MLJ 227 (refd)

Datuk Bandar Kuala Lumpur v Seman bin Amat and other cases [1996] 3 CLJ 263 (folld)

Gurbachan Singh v Seagrott & Campbell (No 2) [1962] MLJ 370 (folld)

Jasabena Sdn Bhd v Beh Heng Poo & Anor [1985] 1 MLJ 394 (folld)

Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (folld)

Public Feedmill (M) Sdn Bhd (In liquidation) v Hai Yeu Hin [1994] 2 MLJ 34 (folld)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 56 rr 1(2), 1(3)

Wan Mustapha bin Wan Ali (*Wan Mustapha & Co*) for the appellant/plaintiff.

S Maniarasan (*Nazri Aziz & Wong*) for the second and fifth respondents/defendants.

Cur Adv Vult

Nik Hashim JC: This is an appeal to the judge in chambers against the decision of the senior assistant registrar ('the SAR') on 19 March 1996 wherein he allowed the application by the second and fifth respondents to strike out the appellant's claim against them under O 18 r 19 of the Rules of the High Court 1980 ('the RHC').

Before hearing the appeal, En S Maniarasan, learned counsel for the respondents, raised a preliminary objection that the respondents were not served with a sealed copy of the notice of appeal two clear days before 29 October 1996, the day fixed for hearing of the appeal; and what was served on 13 April 1996 was a notice of appeal without seal, undated and unsigned by the registrar and as such, he submitted that the appeal is not properly brought before the court being in contravention of O 56 r 1(3) of the RHC.

Dato' Wan Mustapha bin Wan Ali, learned counsel for the appellant, on the other hand, argued that the notice of appeal dated 24 March 1996 was duly served on the respondents on 13 April 1996 well within time. He further complained that he was not given due notice of the proposed objection.

After hearing their submissions which I shall revert to them later, I was left with the thought that since the notice of appeal itself is a question of fact and that there is no affidavit evidence in support of the objection, I requested both counsel to address me further whether I could entertain the objection based on the statements from the bar, and adjourned the case to another date.

At the continued hearing, En S Maniarasan responded that the objection taken was on a point of law in that O 56 r 1(3) was breached by the appellant for failing to serve a sealed copy of the notice of appeal within time and according to him, the affidavit evidence in support of the objection was therefore not necessary. He contended that the burden to prove service of a sealed copy of the notice of appeal is on the appellant.

Dato' Wan Mustapha replied that affidavit evidence in support of the objection is needed and that since the respondents had failed to file one, the burden to prove service of the notice of appeal does not arise.

What is clear from the decided cases is the need for prior notice of the preliminary objection. The rationale behind the need for prior notice is to prevent surprise. It has been said that it is a good practice for a party intending to raise a preliminary objection to do so by giving prior notice (see *Datuk Bandar Kuala Lumpur v Seman bin Amat & Ors* [1996] 3 CLJ 263). Thomson CJ in *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370 at p 371 said:

> Before departing from the case, I should observe that the procedure followed by the respondents, that is to say, giving the other side notice at the earliest possible moment and then dealing with the matter when the appeal comes on for hearing seems to be the course that was followed and certainly not disapproved of in the case of *Re Helsby* [1894] 1 QB 742.

However, it is not the law that the absence of prior notice will totally shut the door for the intended objector from raising the objection. In *Jasabena Sdn Bhd v Beh Heng Poo & Anor* [1985] 1 MLJ 394, even though no prior notice was given, the court heard the preliminary objection of the respondent, but for lack of merit, the court dismissed the objection raised.

In the case before me, there was a prior notice. A day before the hearing of appeal, that is on 18 November 1996, the respondents' solicitor had sent a notice by fax to the appellant's counsel indicating that among other things:

> We shall be raising a preliminary objection on the ground that your service of the notice of appeal on us is improper.

In my view, the notice was good, and the procedural requirement of giving the other side notice at the earliest possible moment had been satisfied in this case. It seems that prior notice is the only requirement that is needed

before a preliminary objection is raised. Since a notice was given and the disputed unsealed copy of the notice of appeal was made available before the court, I hold that the need for an affidavit evidence in support as posed by me earlier is therefore not necessary. A prior notice of the preliminary objection is sufficient. As prior notice was given to the appellant in this case, he could not be heard to say that he was caught by surprise by the preliminary objection of the respondents.

It is not in dispute that the unsealed copy of the notice of appeal was served on the respondents on 13 April 1996. Dato' Wan Mustapha argued that for the purpose of satisfying O 56 r 1(3) of the RHC, the respondents need not be served with a sealed notice of appeal. He submitted that service with an unsealed copy is good enough.

Order 56 r 1 of the RHC states that:

> (1) An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar.
>
> (2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice in Form 114 to attend before the Judge on a day specified in the notice.
>
> (3) Unless the Court otherwise order, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less that 2 clear days before the day fixed for hearing the appeal.

Before a notice of appeal can be said to be valid in law, it has to be issued. What does the word 'issued' mean under O 56 r 1(3) of the RHC? Abdul Malik Ishak J in *Chern Yen Ming & Anor v Teng Ik Ngee Construction Sdn Bhd & Ors* [1996] 4 MLJ 227 at p 231 said:

> ... Now, even though the words like 'signed, sealed and dated' do not appear in O 56 r 1(3) of the RHC, yet on perusal of Form 114, I venture to say that in construing the meaning of the word 'issued' the usual salutations of 'signed, sealed and dated' should be attached to it, after all the word 'seal' appears at the bottom portion of Form 114 just above the word 'registrar'.

He continued to say at the same page:

> ... to construe the meaning of the word 'issued' under O 56 r 1(3) of the RHC, it would be when the notice of appeal to the judge in chambers is actually signed, sealed and dated and when such notice is signed, sealed and dated, then it is deemed to be issued and it is on that date that the court must construe that it was issued.

With respect, I am in agreement with the learned judge on the interpretation of the word 'issued' under O 56 r 1(3) of the RHC. In the instant case, the notice of appeal which was served on the respondents on 13 April 1996 was not sealed, dated and signed by the registrar. Neither was the date for the hearing of the appeal before the judge in chambers fixed in that notice. The notice was filed in court on 24 March 1996, and it was issued by the court dated also on 24 March 1996. But it is significant to note that it was

not the notice which was issued and dated 24 March 1996 that was served on the respondents. What was served on 13 April 1996 was a 'blank' notice of appeal which was unsealed, undated and unsigned by the registrar. Until the notice is signed, sealed and dated by the registrar of the High Court as required in Form 114, the notice of appeal, in my view, cannot be said to be a valid notice of appeal clothed with the legal authority of being issued pursuant to O 56 rr 1(2) and (3) of the RHC (see *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85). In my judgment, the notice of appeal that was served on 13 April 1996 is not a valid notice of appeal. It was not issued by the court. The notice was prematurely served. Service with an invalid notice of appeal cannot be considered a valid service.

It was also not in dispute that the sealed copy of the notice of appeal was only served on the respondents on 16 November 1996, well after the first date of hearing of the appeal which was fixed on 29 October 1996. On 29 October 1996, however, at the request of the appellant, the hearing of the appeal was adjourned to 19 November 1996.

Order 56 r 1(3) of the RHC prescribes that service of the notice has to be effected two clear days before the returnable day for hearing the appeal. In this case, whilst the notice was issued as required by the first limb of O 56 r 1(3) within the prescribed five days after the judgment, the requirement of the second limb was not met.

VC George J in *Public Feedmill (M) Sdn Bhd (In liquidation) v Hai Yeu Hin* [1994] 2 MLJ 34, on the issue whether the adjournment of hearing of appeal had the effect of extending the date of service of the notice of appeal, had this to say at p 39:

> The two adjournments of the date of hearing of the appeal does not have the effect of nullifying the notice that had been issued on 13 April and per se does not have the effect of extending the date of service of the notice.

With respect, I agree with the learned judge. The principle applies here. In this case, the proper notice was not served until 16 November 1996, that is 21 days after 29 October 1996, the date fixed for hearing the appeal. In the event, I hold that the adjournment of the hearing of the appeal to 19 November 1996 similarly, does not have the effect of extending the date of service of the valid notice of the appeal.

The provisions of O 56 r 1(3) of the RHC are mandatory, and it is the duty of the party who wishes to appeal to comply with them strictly. In the case before me, the notice of appeal that was served within time was not valid for lack of legal authority, while the valid one was served outside the prescribed period. Accordingly, I rule that the appeal cannot be said to have been brought properly before the court, and as such, on the preliminary objection, the appeal to the judge in chambers is struck off with costs.

Preliminary objection allowed.

Reported by Ooi May Ling